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NACAP ASIA PACIFIC SDN BHD

v.

JEFFREY RONALD PEARCE & ANOR

B

HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[APPLICATION FOR JUDICIAL REVIEW NO: R2-25-302-2008]
14 MAY 2010

C ***ADMINISTRATIVE LAW:*** *Remedies - Certiorari - Application to quash award by Industrial Court - Whether Court had jurisdiction to hear dispute - Whether 1st respondent a workman within Industrial Relations Act 1967 - Whether there were grounds to quash award*

D ***LABOUR LAW:*** *Industrial Court - Jurisdiction - Termination of employment of 1st respondent, a foreigner - Whether Court had jurisdiction to hear the matter - Whether applicant had demonstrated findings of fact by court palpably perverse - Whether 1st respondent should be afforded protection against unfair dismissal in the event employment contract void*

E

CONTRACT: *Employment contract - Wrongful termination - Termination of employment of 1st respondent, a foreigner - Whether 1st respondent a workman within Industrial Relations Act 1967 - Whether applicant employer for 1st respondent - Whether Industrial Court had*

F *jurisdiction to hear the matter - Whether employment contract illegal*

CONTRACT: *Illegality - Pleadings - Whether defence of illegality must be specifically pleaded*

G This was an application for an order of *certiorari* to quash the award by the Industrial Court *ie*, the 2nd respondent. The 1st respondent, a foreigner, who had commenced employment with the applicant as a QA/QC manager in a company based in Thailand, was terminated from employment. He then made an application under s. 20 Industrial Relations Act 1967 ('IRA') and the matter

H was heard by the 2nd respondent who held in his favour. The applicant submitted that the 2nd respondent had failed to distinguish the present facts with the case of *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* and applied the rationale wrongly. The applicant claimed that the 1st respondent was never in

I employment as he had entered into an illegal and void contract pursuant to the Employment (Restriction) Act 1968 ('ERA'). Hence, the 1st respondent was not a workman within the

definition of the IRA. Based on this, the applicant further claimed that the 2nd respondent did not have jurisdiction to hear the matter. The 1st respondent contended that the applicant had sought to raise a new point that was not pleaded *ie*, that the employment contract was an illegal contract.

Held (dismissing the application):

(1) It is settled law that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before which the action is tried, the court upon being satisfied that the transaction is indeed illegal, is obliged to act upon it. In this instance, the High Court upheld the decision of the 2nd respondent which held that the applicant's defence of void contract was untenable both in law and in fact. (paras 12 & 18)

(2) From the reading of the employment contract and the relevant documents, it was clear that the 1st respondent was a workman within the meaning of IRA and that applicant was his employer, who had subsequently terminated his service. (para 17)

(3) The fact that the 1st respondent, a foreigner, signed a Malaysian contract with the applicant, a Malaysian company, and was mobilised to Thailand and later dismissed by the applicant, meant that the 2nd respondent had jurisdiction to hear the matter. The 2nd respondent had properly considered the evidence before it and there were no grounds to merit intervention from the High Court. *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* (foll). (para 18)

(4) The 2nd respondent made a finding of fact that the 1st respondent signed a Malaysian contract with a Malaysian company ie, the applicant and then was mobilised to work in Thailand. The finding of fact by the 2nd respondent could be successfully assailed before the High Court only when the applicant demonstrates that the findings were palpably perverse. The applicant had failed to do this. (para 19)

(5) The ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975, to which Malaysia is a party, expressly provides that in situations where laws and regulations controlling movement of migrants for employment were not respected, the migrant worker shall nonetheless enjoy

A the equality of treatment in respect of rights arising out of past employment. The 1st respondent should be afforded the protection from unfair dismissal as provided under the IRA even if the contract of employment between him and the applicant was void. (paras 22-24)

B

Case(s) referred to:

CIT v. Mukundray K Shah, [2007] ITR 433 ***(refd)***

Discovery Health v. Cinnussuib for Concilliation Mediation and Arbitration JR 2877/06 (Unreported) ***(refd)***

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC C ***(refd)***

Kojasa Holdings Bhd v. Kathiravely Ganesan [1993] 1 ILR 406 ***(refd)***

Kojasa Holdings Bhd v. Mahkamah Perusahaan Malaysia & Anor [1995] 1 ILR 713 ***(refd)***

Mustafa Osman v. Lee Chua (P) [1996] 3 CLJ 494 CA ***(refd)***

D *R Ramachandran v. The Industrial Court of Malaysia & Anor [1977] 1 MLJ 145* ***(refd)***

Legislation referred to:

Contract Act 1950, s. 24

Employment (Restriction) Act 1968, s. 5(2)

E Industrial Relations Act 1967, ss. 2, 20(1)

ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975, art. 9

For the applicant - K Sivabalan (Sharifah Ainal with him); M/s Shahrizat Rashid & Lee

F *For the 2nd respondent - Allen Miranda; M/s Suraiya Arif, Miranda & Lim*

Reported by Melinda Robert

G

JUDGMENT

Mohd Zawawi Salleh J:

Introduction

H **[1]** This case concerns an application by the applicant for an order of *certiorari* to quash the Industrial Court's Award No. 1571/2008 dated 5 September 2008.

[2] I have heard the learned counsel appearing for the parties I at length, considered the written submissions filed by both parties and perused the relevant record. I dismissed the application with cost.

Brief Facts

[3] The 1st respondent ("claimant"), who is an Australian citizen, commenced employment with the applicant on 14 June 2004 as QA/QC Manager for the Third Transmission Pipeline for PTT Company Limited which based in Thailand. The claimant at the time of termination was paid USD 10,000 per month and his salary, allowance and tax was paid for by Nacap Thailand.

[4] Prior to the claimant's engagement with the Thai entity, the claimant entered into a contract of employment in Malaysia with a Malaysian entity known as Nacap Asia Pacific Sdn Bhd ("the applicant"). The applicant claimed that the said contract employment was void in law and against Malaysian public policy. The claimant, on the other hand, claimed that he was employed by the applicant in Malaysia and then seconded to Nacap Thailand.

[5] On or about 28 May 2005, after 12 months in employment, the claimant was terminated by notice for alleged poor performance. The claimant made a representation to the Director General and the Minister of Human Resource in Malaysia under s. 20 of the Industrial Relations Act 1967 which matter was then referred to the 2nd respondent, hence the award being made.

Applicant's Submission

[6] The cornerstone of the applicant's submission is that the contract of employment was void due to illegality. According to the applicant, the claimant was prohibited by the Government of Malaysia and more specifically the Immigration Authorities from entering and/or taking up employment in Malaysia. The claimant was only allowed to enter Malaysia on a condition as a tourist.

[7] The applicant submits that the 2nd respondent erred in law in holding the contract of employment was entered with the applicant because the claimant lacks the legal capacity in accordance with the Contract Act 1950 to enter into a valid contract. It is public policy in Malaysia that a foreigner cannot enter into any agreement or take up any engagement without prior approval from the immigration authorities.

[8] The applicant further submits that the error committed by the 2nd respondent goes to the jurisdiction as to whether the 2nd respondent can hear such a matter.

[9] To support his submissions, the applicant cited s. 24 of the Contract Act 1950 which reads as follows:

> The consideration object of an agreement is lawful, unless:
>
> (a) **it is forbidden by law;**
>
> (b) **it is of such a nature that, if permitted, it would defeat any law;**
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) it regards it is as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void. (emphasis added)

[10] According to the applicant, the Claimant's Contract of Employment is also an illegal agreement and is against public policy by virtue of s. 5(2) of the Employment (Restriction) Act 1968.

Findings Of The Court

[11] The 2nd respondent submits that the applicant sought to raise a new issue/point which is not pleaded. This new issue is that the contract of employment is void. This defence represents a radical departure from the applicant's pleaded case because throughout the hearing at the Industrial Court, the applicant steadfastly held on to the validity of the contract of employment dated 7 May 2004.

[12] With respect, I disagree. It is settled law that "illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the court before whom the action is being tried, the court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it." (See *Mustafa Osman v. Lee Chua (P)* [1996] 3 CLJ 494.

[13] The leading case pertaining to the employment of foreigner is the case of *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777. The applicant posits that the 2nd respondent failed to distinguish the present facts of the case with *Khatiravelu*'s case and applied the rationale wrongly. The Supreme Court's decision in that case is not applicable and can be easily distinguished with the case before this court. In *Kathiravelu*, the claimant who was a foreigner, was already in employment with a Malaysian employer and only later he seconded to Singapore to serve the employer's related companies. However, the instant case is one where the claimant never was in employment as he entered into an illegal and void contract. The immigration authority of Malaysia had imposed a restriction on the claimant and as such he could not have entered into a valid contract of employment. Hence, the claimant is not a workman within the definition of the Act.

[14] According to the applicant's, in *Kathiravelu*'s case, the court held that the fact that a workman who is engaged within Malaysia by his employer, who is also within the jurisdiction, to carry out his duties in a foreign country will not by itself place his subsequent dismissal in the category of extra-territorial disputes. This is so irrespective of whether he was required to pay taxes levied by that country or to contribute towards any savings scheme there. In the present case, the employment agreement between the claimant and the company is void and the legal employer for the claimant is Nacap Thailand. This is the fundamental difference between the instant case and the *Kathiravelu*'s case.

[15] The Court of Appeal qualified itself when it clearly stated that the workman must be engaged within Malaysia and in the present case before this court, the claimant cannot be in the similar position as the Immigration Authority of Malaysia has prohibited this.

[16] To do justice to the applicant, it is necessary to analyse critically *Kathiravelu*'s case at all levels:

(a) *Kathiravelu*'s case at 1st instance - The Industrial court

Case: *Kojasa Holdings Bhd v. Kathiravely Ganesan* [1993] 1 ILR p. 406.

A At p. 407 of this decision, at para. D, right:

> It specifically prayed as highlighted in para. 4 of the statement in reply the following preliminary objection:
>
> B Since the claimant is not a citizen of Malaysia nor was he, at all material time, ever employed in Malaysia, this Honourable Court is not seized with jurisdiction to hear this dispute.

Page 407, para. H until I, right until p. 408 para. A left:

> C The question raised as an issue for determination is whether this court has jurisdiction to hear the claimant's claims. The company's contentions expressed in para. 4 of the statement in reply is that the claimant is not a citizen
> D of Malaysia and because of his citizenship status he cannot file representations under s. 20(1) of the Industrial Relations Act 1967. The claimant is similarly disqualified to make representations under the same Act because he was not employed in Malaysia of the material time of dismissal.
> E The undisputed fact are:

Page 411 para. E right, until p. 412 para. D left:

> In his submission on the question of jurisdiction to hear the claimant's claim counsel for the company has urged the
> F court to note that the claimant was never a permanent resident of Malaysia. The claimant had no work-pass to work in Sabah and had obtained work-pass to work in Singapore. That the claimant did not pay Malaysian tax nor did he contribute to the Malaysian EPF since July 1988.
> G That he was paying tax in Singapore and contributing to the Singapore Provident Fund. That his dismissal took place in Singapore and not in Malaysia. That he received his letter of dismissal in Singapore.
>
> H **The learned counsel has also submitted at great length the effect of the Employment (Restriction) Act 1968**, and the consequence of not having a valid work-pass and that the Industrial Relations Act 1967, is territorial in nature. He said the claimant's employment and his dismissal
> I were outside Malaysian territory. This in his view, prohibits the Industrial Court from hearing the claimant's claim.

With respect I do not think the submission on the Employment (Restriction) Act and territorial jurisdiction is relevant to the issue before this court.

The crux of the matter in the context of the preliminary objection, to my mind, is a question of employer - employee relationship. Looking at the facts of this case in the above perspective and after reviewing the overall aspects of the claimant's transfer to Euromas, Singapore, it appears that there is continuity of service as before the transfer and there can be no basis to hold Euromas as the claimant's new employer in Singapore. The company remains in form and also in law, the real employer despite the transfer and the claimant was at the material time the employee of the company.

Since the company is local and within the jurisdiction of this court 1 hold that the company's preliminary objection has failed and the Registrar is directed to set the case down for hearing on the merits. (emphasis added)

The preliminary objection is disallowed.

(b) *Kathiravelu*'s case on appeal to the High Court

Case: *Kojasa Holdings Bhd v. Mahkamah Perusahaan Malaysia & Anor* [1995] 1 ILR p. 713.

At p. 716 of this decision, at para. f:

The next question for me to decide is whether the Industrial Court had jurisdiction to hear a dispute between *the claimant who is not a citizen of this country but employed by the company which is a Malaysian company to work in a country outside Malaysia, namely Singapore*.

The Employment (Restriction) Act 1968 prohibits the employment of non-citizens in Malaysia unless they have been issued with valid employment permits.

At p. 717 para. a until c:

The company could not continue to employ the claimant in Malaysia after his work pass was not renewed. The claimant was posted to Singapore and at the material time he was working in Singapore. He was issued with a work pass by

A the Singapore Authority. He paid Singapore tax and he contributed to the Singapore Provident Fund. He was thus an employee of the company in Singapore and thus Singapore Laws will be applicable to him.

B According to Mr. Lobo the learned Counsel for the claimant, the test whether or not the Industrial Court has jurisdiction should be - for whom was he working? As he was working for a company within jurisdiction, the Industrial Court will have jurisdiction to hear a dispute between him and the Malaysian employer. I cannot agree C with him. The claimant was employed in Singapore. *Non-citizen employees of Malaysian Companies doing business abroad are subject to the laws of the country in which they are employed. That country's laws will be applicable to them. They* D *cannot avail themselves to the rights under the Malaysian laws merely because they are employed by a Malaysian company.* (emphasis added)

(Note: the parts italic above were overruled by the Supreme Court).

E

(c) *Kathiravelu*'s case on appeal to Supreme Court;

Case: *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777.

F

Page 787 of this decision, at para. d until p. 788, para. a:

The respondent went on to argue that, on the facts of this case, the representations made by the appellant under s. 20(1) clearly relate to matters which occurred outside G the jurisdiction of the Industrial Court. We have, when setting out the fact pattern of this case, adverted to those matters relied upon by the respondent in support of the argument based on extra-territoriality. We do not propose to repeat them here.

H

Mr Sivabalah, who appeared for the respondent, submitted that the contract between the parties was at an end when the appellant's work permit was not renewed. He argued that a new engagement had occurred in Singapore and I that the contract of employment was to be performed in

that country. These are matters over which the Industrial Court had no jurisdiction. Lastly, it was submitted for the respondent that the Act was passed for the protection of workmen - whether citizens or foreigners - working in Malaysia in the employment of Malaysia or foreign companies. **The Act does not extent to workmen engaged by Malaysian companies in a foreign country to work in that country**.

In support of the appeal, Mr. Lobo argued that no question of an exercise of extra-territorial jurisdiction arises in the case. Here is a case where the employer is a Malaysian company. The contract of employment was entered into in Malaysia and therefore within the jurisdiction of the Industrial Court. The appellant was merely sent by his Malaysian employer to work in Singapore. There was no termination followed by a fresh engagement. There was, therefore, continuity of service in this case. It was also argued that so long as the fact pattern of a given case fell within the ambit of s. 20(1) of the Act, the Industrial Court had jurisdiction to adjudicate upon the dispute.

So much for the arguments upon the first issue.

In our judgment, the facts of this case do not give rise to the exercise of any extra-territorial jurisdiction by the Industrial Court. *The fact that the appellant was engaged within the jurisdiction by an employer within the jurisdiction concludes the issue of extra-territoriality against the respondent. That the appellant was required to perform his contract of employment in another company in a foreign or to make payments towards any compulsory saving scheme that was in operation in that country cannot, in our judgment, make the dispute extra-territorial in nature. Further, one should not lose sight of the fact that the power to dismiss the appellant was at all times vested in the respondent who was well within the territorial jurisdiction of the Industrial Court.*

It is convenient at this juncture to consider the arguments that deal with the persons to whom the Act is meant to apply.

> Meaning no disrespect to counsel, we find the test suggested by Mr Lobo to be far too wide while we find that suggested by Mr Sivabalah to be far too narrow. In our judgment, it is undesirable to formulate any hard and fast rule that is meant to govern all cases that arise for decision. It depends very much on the facts of each case. But we think it safe to say this much. The fact that a workman who is engaged within Malaysia is required by his employer, who is also within the jurisdiction, to carry out his duties in a foreign country will not by itself place his subsequent dismissal in the category of extra-territorial disputes. (emphasis added)

[17] After the distillation of *Kathiravelu*'s case above, it must now be applied to the facts of the case to answer the applicant's related grounds for review:

(a) Whether the employment agreement dated 17 May 2004 entered into by the claimant and the applicant is a valid agreement or is an illegal agreement against public policy.

The Employment (Restriction) Act 1968 was also before the court and the court went on to hold that the contract of employment was a valid contract.

(b) Who is the claimant's actual employer?

The answer lies in the service agreement itself ie, exh. "COE 2/CLB 1-7". (See Jan's supporting affidavit, exh. JM7, p. 104-110). The claimant's employer is Nacap Asia Pacific Sdn Bhd.

(c) Whether the claimant is a workman within the meaning of s. 2 of the Industrial Relations Act 1967 or an independent contract?

He is a workman applying the decision in *Kathiravelu*'s case.

The 2nd respondent held that the claimant is indeed a "workman" within the meaning of the Act for the following reasons:

(i) the service agreement dated 7 May 2004 (exh. "COE-2/CLB 1-7") signed by Mr Jakob Reenders the Chief Executive Officer of Nacap Asia Pacific Sdn Bhd. (See Jan's supporting affidavit, exh. "JM7, p. 103-110);

(ii) the "commencement of employment" letter dated 11 June 2004 (exh. "COE-9/CLB-8") signed by Mr Jakob Reenders the Chief Executive Officer of Nacap Asia Pacific Sdn Bhd. (See Jan's supporting affidavit, exh. "JM7, p. 111).

(iii) the letter of termination dated 12 May 2005 signed by Peter Gregory, the Director of Nacap Asia Pacific Sdn Bhd (See Jan's supporting affidavit, exh. "JM7", p. 115).

(iv) in the letter from Nacap Asia Pacific (Thailand) Co Ltd dated 8 May 2005 signed by Vichaya Vitheethum, the director, at the last paragraph, it is stated (See Jan's supporting affidavit, exh. "JM5" p. 30):

> As he (meaning the Claimant) is on secondment to the Project from Nacap Asia Pacific Sdn Bhd I will leave the details of his dismissal to you.

(d) Who actually dismissed the claimant?

The letter of termination dated 12 May 2005 was signed by Peter Gregory, the Director of Nacap Asia Pacific Sdn Bhd. (See Jan's supporting affidavit, exh. "JM7", p. 115). Also in the letter from Nacap Asia Pacific (Thailand) Co Ltd signed by Vichaya Vitheethum, the director, at the last paragraph, it is stated (See Jan's supporting affidavit, exh. "JM5" p. 30):

> As he (meaning the claimant) is on secondment to the Project from Nacap Asia Pacific Sdn Bhd I will leave the details of his dismissal to you.

The answer therefore is that it was the applicant company which terminated the claimant's appointment.

(e) Whether the claimant should have brought the action against Nacap Thailand.

No, because the claimant's employer is Nacap Asia Pacific Sdn Bhd.

[18] In my considered opinion, the 2nd respondent had properly considered the evidence adduced before it and the award handed down was not infected with error of law that merit curial intervention by this court. (See *R Ramachandran v. The Industrial Court of Malaysia & Anor* [1977] 1 MLJ 145). The 2nd respondent was correct when it held that:

(a) The claimant is a foreigner who signed a Malaysian contract with a Malaysian Company ie, Nacap Asia Pacific Sdn Bhd. He was mobilized to work in Thailand and he paid Thai taxes. His letter of termination was signed by Nacap Asia Pacific Sdn Bhd. These facts are on all fours with Supreme Court's decision in *Kathiravelu*'s case which says that the Industrial Court has jurisdiction to hear this dispute.

(b) The claimant was a termination simpliciter. From the documents found in the claimant's bundle of documents, and from the claimant's testimony, the claimant has proved on a balance of probabilities that he has in fact acted on the "critical action list". The applicant, who bears the burden of proof, failed to discharge this burden because the witnesses for the applicant admitted under cross-examination that they do not have personal knowledge of the facts relating to the claimant's work performance. The applicant has therefore failed to lead credible evidence to justify the termination of the claimant's employment.

(c) There is evidence that at that material time the applicant failed to provide adequate resources to assist the personnel at the company to attend to and to complete the items in the "critical action list". This evidence can be found at Richard Boreham's e-mail of 7 February 2005. (Please refer to exh. "CLE2/CLB14", which states; (See Jan's supporting affidavit, exh. "JM7, p. 117):

> Jeff,
>
> Whilst I understand and support the need to develop these I'm afraid that I have no resources available at this time to prepare these job descriptions. I think there needs to be a little realism from corporate auditors in terms of what is possible ...

(d) Reference may be make to exh. "COE15" a letter written by Jakob Reenders "COWS3". At the 2nd last paragraph (See Jan's supporting affidavit exh. "JM5" p. 31):

> Taking into consideration the limited resources that you may have had on the project ...

(e) The applicant's defences of mistake and void service agreement is untenable both in law and in fact. It is merely an afterthought which is at once both illogical and flies in the face of documents executed by the company's own senior officers.

(f) In this application for review the applicant has abandoned the issue of "non-performance". The applicant has instead focused its grounds on the fact that the letter of employment was made between the claimant and another foreign entity.

(g) The applicant states that the facts of the present case are different from *Kathiravelu* 's case (see Jan's supporting affidavit, para. 17.21). The applicant alleges that the difference is that, unlike *Kathiravelu* 's case, in the present case, the service agreement/employment contract was supposed to have been entered between the claimant and NACAP Thailand. The answer to these allegation have been explained above.

[19] It is pertinent to note that the 2nd respondent made a finding of fact that the claimant signed a Malaysian Contract with a Malaysian Company ie, Nacap Asia Pacific Sdn Bhd and then mobilized to work in Thailand. The finding of fact by the 2nd respondent can be successfully assailed before the High Court only when the applicant can demonstrate that such a finding was palpably perverse. Perversity has been defined as indicative of an action, opinion, or conclusion which could not reasonably be arrived at. (See *CIT v. Mukundray K Shah,* [2007] ITR 433 (SC)). In my considered opinion, the applicant had failed to do so.

[20] Before I conclude, perhaps it would be useful to refer to a judgment in the Labour Court of the Africa, *Discovery Health v. Cinnussuib for Concilliation Mediation and Arbitration* (case JR 2877/06 - unreported). The court has determined that the definition of an "employment" in terms of the Labour Relations Act of South Africa is not limited to the existence of a common law contract of employment. Even in circumstances where continued employment constitutes a breach of national immigration laws, an illegally employed alien will still enjoy the rights to fair labour practices and access to the statutory dispute resolution mechanism.

[21] The Labour Court stated the following, with reference to analogous provisions of the South Africa Immigration and employment laws:

> There is a sound policy reason for adopting a construction of s. 38(1) that does not limit the right to fair labour practices. If s. 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to that effect. An unscrupulous employer, prepared to risk criminal sanction under s. 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if discovery Health's contention is correct, she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislature intended that the contract be invalid where the employer party acted in breach of s. 38(1) of the Act. This is particularly so when persons without the required authorization accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorized engagement) to initiate any right of recourse against those who engage them.
>
> Far from defeating the purposes of the Immigration Act, to sanction a claim of contractual invalidity in these circumstances would defeat the primary purpose of s. 23(1) of the Constitution which is to give effect through the medium of labour legislation, to the right to fair labour practices.

[22] It is pertinent to note that art. 9 of the ILO Migrant Workers (Supplementary Provisions) Convention 143 of 1975 states as follows:

> Without prejudice to measures designed to control movements of migrants for employment by ensuring that migrant workers enter national territory and are admitted to employment in conformity with the relevant laws and regulations, the migrant worker shall, in cases in which these laws and regulations, the migrant worker shall, in cases in which these laws and regulations have not been

respected and in which his position cannot be regularized, enjoy equality for himself and his family in respect of rights arising out of past employment as regards remuneration, social security and other benefits.

[23] This ILO Convention, to which Malaysia is a party, expressly provides that where laws and regulations which control the movement of migrants for employment - such as the Immigration Act - have not been respected, the migrant worker shall nevertheless enjoy equality of treatment in respect of rights arising out of past employment. This is the international labour standard prescribed by the ILO.

[24] In my considered opinion, even assuming that the contract of Employment between the claimant and the applicant is void (which is denied), the applicant is entitled to the protection from unfair dismissal provided under the Industrial Relations Act 1967.

Conclusion

[25] For the reasons above stated, I would dismiss this application with costs.